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MICHAEL RODAK, JR.,

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-560

FIRST NATIONAL BANK OF FAIRBANKS,

Petitioner,

v.

WILLIAM B. CAMP,
Comptroller of the Currency of The United States,

and

THE FIRST NATIONAL BANK OF ANCHORAGE,

Respondents.

BRIEF FOR RESPONDENT THE FIRST NATIONAL BANK OF ANCHORAGE IN OPPOSITION

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In the

Supreme Court of the United States

October Term, 1972

No. 72-560

First National Bank of Fairbanks,

Petitioner,

v.

William B. Camp,
Comptroller of the Currency of The United States,

and

The First National Bank of Anchorage,

Respondents.

BRIEF FOR RESPONDENT THE FIRST NATIONAL BANK OF ANCHORAGE IN OPPOSITION

Respondent The First National Bank of Anchorage ("FNB Anchorage") opposes the petition for a writ of certiorari filed in this matter.

Opinions Below

The opinions of the court of appeals and the district court are set forth, respectively, in appendices A and B to the petition.

Jurisdiction

The grounds on which this Court's jurisdiction is invoked are adequately set forth in the petition.

Questions Presented

1. Whether the district court and the court of appeals were correct in holding that the Comptroller of the Currency was not automatically bound under federal law to deny a national bank branch application solely because the state supervisor of banking testified hypothetically that if presented with similar factual circumstances he would exercise his discretion to deny a state bank branch application.

2. Whether the district court and the court of appeals were correct in holding that the Comptroller of the Currency's approval of FNB Anchorage's application for a branch in Fairbanks was supported by substantial evidence in the administrative record, was neither arbitrary or capricious, and was in accordance with all applicable federal and state statutes.

Statement

This litigation arises out of the Comptroller of the Currency's grant of approval to FNB Anchorage, a national bank headquartered in Anchorage, Alaska, to establish a branch office in Fairbanks, the second largest city in Alaska. (JA 160, 165)* Until this branch was granted, FNB Anchorage had no branch operating within approximately 200 miles of Fairbanks. (JA 27)[1]

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* References to the record below are to (1) the Joint Appendix filed in the court of appeals, cited "JA ——" herein, and (2) the transcript of the administrative hearing, cited "Tr. ——" herein.

[1] The Comptroller granted final approval for the opening of the disputed branch on December 23, 1970. (JA 165) FNB Anchorage was prepared to open the branch in May 1971, at the time the district court entered judgment in favor of Respondents. However, opening of the branch was delayed by virtue of a stay pending appeal granted by the court of appeals. On July 25, 1972, after it

Petitioner First National Bank of Fairbanks ("FNB Fairbanks") is one of two commercial banks headquartered in Fairbanks. (JA 155) Together these banks operate 14 of the 16 commercial bank offices in the Fairbanks service area and hold approximately 83% of the commercial deposits and loans in that area. (JA 122, 155) The only banking offices in Fairbanks operated by out-of-town banks are (1) a branch of the National Bank of Alaska, the State's largest bank and FNB Anchorage's principal competitor, opened in December 1969, and (2) a branch of Alaska State Bank, a state-chartered bank. (JA 152, 155)

FNB Anchorage's application for a branch in Fairbanks received extensive consideration by the Comptroller of the Currency, and the voluminous record developed in the administrative proceedings was before both of the courts below. Upon initial consideration of the application, the Comptroller, presented with divided recommendations from both his regional staff and his staff in Washington, denied the application. (JA 147, 148) FNB Anchorage requested reconsideration of this decision. (JA 11-12) The Comptroller, acting upon the unanimous recommendations of his regional and Washington staffs, reversed his earlier ruling and granted approval of the application. (JA 151-160) The principal new information developed in the reconsideration process was that during the first nine months of operation of the Fairbanks branch of the National Bank of Alaska, the two "hometown" banks in Fairbanks—including petitioner—had managed to retain their 83% share

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had entered its judgment in favor of respondents, the court of appeals refused to extend its stay pending an application to this Court for a writ of certiorari, and on July 28, 1972, Chief Justice Burger denied petitioner's application for a stay of the mandate of the court of appeals pending the filing of a petition for a writ of certiorari. The disputed branch was opened for business in August 1972.

of commercial bank deposits in the area, notwithstanding the fact that the new branch had obtained $1 million in deposits during that brief time. (JA 152-155) The Regional Comptroller of the Currency concluded on the basis of this information that "a new entry by applicant, while increasing competition, would not endanger the deposit structures of any existing institutions." (JA 153) In fact, he noted that "from a competitive standpoint, entry by applicant would be beneficial in light of the sizeable concentration of deposits held by the two large [hometown] banks." (JA 154)

In response to petitioner's contention that the entry of another "First National Bank" into the Fairbanks area might cause some confusion, the Comptroller explicitly conditioned his approval of the new branch upon FNB Anchorage's use of a distinctive name for the branch that would eliminate the possibility of confusion. (JA 161) In order to satisfy this condition, FNB Anchorage advised the Comptroller that it would use the name "Interior City Branch" as the prominent designation for its Fairbanks branch and that all of its advertising would be keyed to that name. (JA 164) It assured the Comptroller that the words "First National Bank of Anchorage" would be utilized "only where required by law, and on printed matter will be in smaller print than that of the branch name." (Ibid.) The Comptroller concluded that use of this special designation for the branch would eliminate possible confusion arising from the similarity of names, and on that basis, approved the application for a branch in Fairbanks. (JA 165)

ARGUMENT

Petitioner argues here, as it did unsuccessfully in both the court of appeals and the district court, that the Comptroller was required, as a matter of federal law, to deny FNB Anchorage's branch application solely because the Alaska supervisor of banking testified during the administrative proceedings that he would deny an application for a state-chartered bank under similar factual circumstances. Petitioner characterizes this brief and almost casual observation of the state supervisor as a definitive statement of state law, "consistent" with the state's statute regulating branching of state-chartered banks, and therefore absolutely binding upon the Comptroller.[2] This result, petitioner contends, is mandated by the doctrine of "competitive equality" with respect to the branching of national banks under 12 U.S.C. § 36(c) as interpreted by this Court's decisions in *First National Bank of Logan* v. *Walker Bank and Trust Co.*, 385 U.S. 252 (1966), and *First National Bank in Plant City* v. *Dickinson*, 396 U.S. 122 (1969).

In addition, petitioner argues that the court below erred in failing to hold that the Comptroller was prohibited by "the common law of trade names and unfair competition" from permitting FNB Anchorage to establish a branch in Fairbanks, and that the Comptroller deprived petitioner of "administrative due process" by failing to issue a written opinion explaining his decision.

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[2] The state supervisor's argument was made not on his direct testimony, but upon redirect, as an apparent afterthought. (Tr. 85) The supervisor himself quite clearly believed that his views *were not* binding upon the Comptroller. For example, he testified in the same proceeding that "if it is proven that there is justification, if there is reason for these branches to be approved, if that is determined here then that is the way it should be." (Tr. 69-70)

We respectfully submit that there is absolutely no merit to any of these arguments, that the decisions of the unanimous panel of the court of appeals and the district court were manifestly correct, and that none of the considerations governing review by this Court on writ of certiorari is present in this case. Petitioner does not contend that the decisions below are in conflict with decisions in any other circuit, such as to require resolution by this Court; the case does not involve any important issue of federal law that must be settled by this Court; and the allegation that the decisions below "collide" with this Court's decisions in the *Walker Bank* and *Plant City* cases is patently erroneous.

I.

The Courts Below Correctly Held That the Comptroller's Decision Did Not Violate the Doctrine of "Competitive Equality."

It is well settled that the establishment of branches by national banks is governed by federal law. *First National Bank in Plant City* v. *Dickinson,* 396 U.S. 122 (1969); *First National Bank in St. Louis* v. *State of Missouri,* 263 U.S. 640 (1924). Congress has provided, however, that certain limitations in state branching statutes must be observed by the Comptroller of the Currency in passing on branch applications from national banks. Under 12 U.S.C. § 36(c) the Comptroller is empowered to permit a national bank to establish and operate a branch

> "at any point within the State in which said association is situated, if such establishment and operation are at the time authorized to State banks by the statute law of the State in question by language specifically granting such authority affirmatively and not merely by implication or recognition, and subject to the restric-

> tions as to location imposed by the law of the State on State banks."

In *Walker Bank, supra,* this Court reviewed in detail the legislative history of § 36(c) and concluded that "Congress intended to place national and state banks on a basis of 'competitive equality' insofar as branch banking was concerned," 385 U.S. at 261.

The Alaska banking statutes permit statewide branching; they contain no restrictions upon the location of branches, nor do they confer "home office protection" on incumbent banks. Accordingly, the state supervisor of banking—and thus the Comptroller—is clearly empowered to permit a bank under his jurisdiction headquartered in Anchorage to establish a branch in Fairbanks.

The Alaska statutes set forth several discretionary standards that must be observed by the state supervisor in passing on state bank branch applications. Under section 06.05.415 of the Alaska Statutes, he must be satisfied:

> "(1) . . . that the addition of the proposed facilities in the community is not detrimental to a sound banking system; . . . [and]
>
> (3) [that] the name [of the applicant] is not deceptively similar to that of another bank in the proposed community or otherwise misleading. . . ."

Under the doctrine of "competitive equality," the Comptroller must apply the same standards to national bank branches. *See, e.g., First-Citizens Bank & Trust Co.* v. *Camp,* 409 F.2d 1086, 1091 (4th Cir. 1969); *National Bank of McKeesport* v. *Saxon,* 268 F. Supp. 720 (W.D. Pa. 1967).

It is amply clear from decisions of this Court and the lower federal courts that when applications for branches of national banks are involved it is the Comptroller's re-

sponsibility, and not that of a state banking official, to apply the standards set forth in the state statutes, and that questions as to the application of state branching statutes to national banks involve questions of federal law.

In *Plant City, supra,* this Court's most recent decision involving national bank branching, the question was whether the use of an armored car messenger service by a national bank in Florida was lawful under 12 U.S.C. § 36(c) in light of the Florida statute prohibiting branch banking. The Fifth Circuit Court of Appeals had indicated that a ruling by the state supervisor of banking that these activities constituted branch banking was dispositive. *Dickinson* v. *First National Bank in Plant City,* 400 F.2d 548, 557-58 (5th Cir. 1968). This Court expressly rejected this analysis, holding that the question was to be decided as a matter of *federal* law and stating:

> "to allow the States to define the content of the term 'branch' would make them the sole judges of their own powers." 396 U.S. at 133.

In view of this ruling in *Plant City,* we respectfully submit that petitioner's argument here as to the binding effect of the state supervisor's utterances during the Comptroller's hearing is untenable, and that it is the petitioner's position, not the Comptroller's, that "collides" with the rationale of *Plant City.*[3]

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[3] Petitioner's repeated insistence that the Comptroller was obliged to defer to the state supervisor's views because those views were "consistent" with the state statute simply begs the question. Where a statute sets forth broad discretionary criteria, such as the "sound banking system" criterion in the Alaska statute, it is obvious that reasonable administrators may reasonably differ in their application of the standard. The question is not whether the state supervisor's decision was "consistent" with the statute—even if there were a standard by which to determine consistency—but whether the record contains a rational basis for the Comptroller's decision under the state standards.

Arguments essentially identical to petitioner's have on occasion been raised by state banking interests,[4] but have been consistently rejected by the lower federal courts. It has been held, for example, that the Comptroller is not bound to follow a state supervisor's construction of undefined terms in the state branching statute, *Union Savings Bank of Patchogue* v. *Saxon*, 335 F.2d 718 (D.C. Cir. 1964); a state supervisor's regulation adopted pursuant to a state branching statute, *State of South Dakota* v. *National Bank of South Dakota*, 219 F. Supp. 842 (D.S.D. 1963), *aff'd*, 335 F.2d 444 (8th Cir. 1964); a state attorney general's ruling as to the meaning of a state branching statute, *Leuthold* v. *Camp*, 273 F. Supp. 695 (D. Mont. 1967), *aff'd per curiam*, 405 F.2d 499 (9th Cir. 1969); or even a state court decision as to the meaning of a state branching statute, *Howell* v. *Citizens First National Bank of Ridgewood*, 385 F.2d 528 (3rd Cir. 1967).[5]

These cases have recognized, as the court below recognized, that the doctrine of "competitive equality" relates to equality of *opportunity* for expansion, and that it was not intended to give state officials a veto power over na-

[4] It is anomalous that petitioner, a *national* bank, should be arguing that the Comptroller must exercise his discretion in accordance with the views of a *state* administrator. It might be noted that while the Alaska State Bank and the Alaska Association of State Banks were both parties to the Comptroller's proceeding, neither saw fit either to make this argument or to participate in this litigation.

[5] We submit that this unanimous line of authority and this Court's ruling in *Plant City* on the effect of the state supervisor's interpretation of the state statute are dispositive of the point made here by the State of Alaska as *amicus* that § 36(c) draws an intentional distinction between the "statute law" and the "law" of the referenced state, such that state administrative rulings may be encompassed within the latter term.

tional bank branching. If state administrators choose to interpret their statutes narrowly or to exercise their discretion restrictively, they may be free under state law to do so, but to limit the Comptroller's discretion to permit national banks to branch by reference to the restrictive views of state officials is inconsistent with the concept of dual administration under a common set of statutory guidelines. As the court below stated:

> "The state supervisors apply their state statutes in evaluating state bank branch applications wholly independently of any federal supervision, and we hold that the Comptroller may similarly apply those same state statutes in evaluating national bank branch applications independently of control by the opinions of the state supervisor." (Appendix to Petition, p. A-21)

This conclusion makes obvious good sense, for the opportunities for abuse would be substantial if state officials had the power to advance the interests of state banks, at the expense of national banks,[6] simply by expressing their views to the Comptroller in the guise of "official state policy."[7] While it is obviously appropriate for the Comp-

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[6] In fact, the record in this case suggests that the Alaska supervisor was strongly partisan in favor of state banks and was motivated by a desire to correct what he viewed as an "imbalance" between state and national banks. The record shows that he had never rejected a branch application by a state bank, and had on at least one occasion approved a state bank branch shortly after having opposed a national bank branch in the same area on the ground that the area was "overbanked." (Affidavit of D. H. Cuddy appended to Intervening Defendant's Reply Memorandum in Support of Motion for Summary Judgment)

[7] Notwithstanding the Alaska Attorney General's belated entry into this case, through the filing of his *amicus* brief in this Court, it is highly questionable whether the state supervisor in fact reflected "official state policy." In this very proceeding the Governor of Alaska informed the Regional Comptroller that it is "not the policy of my Administration to either favor or oppose any applications for branch banks in Alaska. It is my feeling that the

troller to consider the views of state officials, Congress invested in the Comptroller, and not in the banking supervisors of the 50 states, the responsibility for assuring the continued health of the national banking system.

II.

The Petition Does Not Present Questions Warranting Review by This Court.

Both the court of appeals and the district court found that the Comptroller had applied the "sound banking system" and "deceptive name" provisions of the Alaska branching statute, and that there was substantial evidence in the record to support his decision with respect to these provisions. Petitioner apparently does not propose to argue in this Court (and it did not argue below) that the Comptroller abused his discretion with respect to the application of these standards, or that there was insufficient evidence to support his conclusions; in any case such arguments would clearly have no merit and would not in any event justify review by this Court. Petitioner's contentions that the Comptroller failed to express his conclusions in formal findings and that he "ignored" the common law of trade names and unfair competition are equally unworthy of review by this Court.

The argument with respect to the lack of findings on the "sound banking system" and "deceptive name" standards in the Alaska statute, which was not raised in the complaint or in either of the courts below, is totally without merit. In the first place, there *was* an express finding

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Comptroller of the Currency has demonstrated clearly the ability to regulate such matters and we do not desire, as a matter of policy, to intervene in such decisions." (JA 130)

on the "deceptive name" issue. In informing FNB Anchorage of the Comptroller's approval of its branch, the Deputy Comptroller stated:

> "Inasmuch as a bank with the words 'First National Bank' in its title presently maintains banking operations in Fairbanks, we will require that the instant branch receive a distinctive designation which will eliminate possible confusion arising from name similarity." (JA 161)

When FNB Anchorage responded by proposing to use the designation "Interior City Branch," the Comptroller's office replied that "emphasis on this name will avoid the possibility of confusion arising from name similarity." (JA 165) The Comptroller thus struck a reasonable balance between the need for new banking competition in Fairbanks and the policy embodied in the Alaska statute that deceptive similarity of names should be avoided. It cannot seriously be argued that the Comptroller failed to express a decision on this issue.

While the Comptroller concededly did not make express findings on the "sound banking system" standard, the record clearly reveals that the soundness of the banking system in Fairbanks and in Alaska as a whole was a predominant issue throughout the proceeding, and was in fact considered at every level of the Comptroller's office. (*E.g.*, JA 135, 148, 151-54, 156-58, 160) In view of this, there is simply no basis for the argument that the Comptroller's final action was rendered invalid merely because of the absence of findings.

Nothing in the national banking laws or the Administrative Procedure Act requires the Comptroller either to make findings or to issue formal opinions in connection with his actions on national bank branch applications.

Sterling National Bank of Davie v. *Camp*, 431 F.2d 514 (5th Cir. 1970), *cert. denied*, 401 U.S. 925 (1971); *Clermont National Bank* v. *Citizensbank National Association*, 329 F. Supp. 1331 (S.D. Ohio 1971); *cf. Guaranty Savings & Loan Assn.* v. *Federal Home Loan Bank Board*, 330 F. Supp. 470 (D.D.C. 1971). In *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402 (1971), this Court made clear that where findings are not required by statute, it is not necessary to remand the case to the agency for such findings if the full administrative record is before the reviewing court. It is only where the reviewing court does not have the full record before it, as was the case in *Overton Park*, that findings may be necessary to provide a basis for adequate judicial review. Nothing in *Overton Park* even remotely suggests that the absence of findings in and of itself constitutes a fundamental denial of fairness in the administrative proceeding, as petitioner suggests here.

Both courts below found the administrative record fully and adequately developed for the purpose of effective judicial review. The entire 454-page administrative record was before each of the lower courts, and was thoroughly scrutinized by each of them. The record contained not only the submissions of the contesting banks and other interested parties, but the complete transcript of the administrative hearing and the detailed analyses and recommendations of every official in the Comptroller's regional and headquarters offices who considered the matter. It is amply clear, as the court of appeals concluded after its extensive analysis of the record, that the question as to the impact of the proposed branch on the soundness of the banking system was given full consideration by the Comptroller's office and, as the court below stated, the record contained substantial evidence that the "sound banking system" standard was met.

Petitioner's reliance on this Court's decision in *FTC v. Sperry and Hutchinson Co.*, 405 U.S. 223 (1972), and *SEC* v. *Chenery Corp.*, 318 U.S. 80 (1943), is totally misplac These cases stand for the proposition that an agency's de sion cannot be sustained on review on a ground other th that on which it was made. They most assuredly do stand for the sweeping contention, rejected by this Court *Overton Park*, that the failure of an agency to render f mal findings in and of itself constitutes a "failure of ministrative due process." In the present case, the rec fully discloses the basis for the Comptroller's action, a the courts below sustained this action on the same basis which it was taken.

Finally, petitioner's complaint that the court below nored the common law of trade names and unfair comp tion is without substance. Nothing in federal law requi the Comptroller, or the federal courts reviewing the Co troller's actions, to deal with such far-removed matters state law. The Comptroller clearly did consider the pr lem of name similarity and resolved it in a reasona manner. If petitioner has other rights under state comm law with respect to the similarity of names, it is free seek vindication of those rights in an appropriate proce ing. Moreover, if such rights exist, petitioner would best be entitled to relief relating to the use of the na Petitioner would certainly not be entitled to prevent establishment of a competing banking facility, found the Comptroller of the Currency to be warranted un federal law, a finding affirmed by the district court and unanimous panel of the court of appeals.

CONCLUSION

For the foregoing reasons, FNB Anchorage submits that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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